10/26/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
JOHN R. MCMANUS AND HELLER CONSTRUCTION COMPANY,	)	**Docket No. CAA-09-93-01**
	)	
	)	
Respondents	)	

ORDERS DENYING RESPONDENTS' MOTIONS TO DISMISS

I

In this civil administrative action, the Environmental Protection Agency (EPA or complainant), alleges that respondents John R. McManus (McManus) and Heller Construction, Inc. (Heller), while renovating the building located at 10156 Donner Pass Road, Truckee, California (the McManus building), failed to thoroughly inspect a "facility" (hereinafter without quotation marks), as defined in 40 C.F.R. Part 61, Subpart M, § 61.141, for the presence of asbestos prior to the commencement of renovation activities. It is alleged that respondents are in violation of 40 C.F.R. § 61.145(a), a rule promulgated pursuant to section 112 of the Clean Air Act (Act), 42 U.S.C. § 7412. (Complaint at 3.)

Complainant also alleges that respondents failed to provide notification of renovation activities at a facility involving the removal of friable Asbestos Containing Material (ACM), and are therefore in violation of 40 C.F.R. § 61.145(b), also promulgated pursuant to section 112 of the Act, 42 U.S.C. §7412. (Complaint

at 3.) Complainant alleges further violations of 40 C.F.R. § 61.145(c)(3), (c)(6), and (c)(8), for failing to adequately wet the asbestos upon removal from the facility, and neglecting to have National Emissions Standards for Hazardous Pollutants (NESHAP) trained personnel at the facility during the renovation. (Complaint, Counts III, IV and V.)

McManus[1] resubmitted a motion to dismiss (motion) on May 27, 1993 under the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.20(a). The Rules state that:

> [T]he Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant. (Emphasis supplied.)[2]

Respondent argues that McManus' private residence, located on the upper floor of the McManus building is not a facility as defined in the NESHAP regulations, and therefore is not subject to the NESHAP requirements and the complainant has no right to relief. On these grounds, respondent requests that the complaint be dismissed.

A facility, as defined by the asbestos NESHAP, is:

> [A]ny institutional, commercial, public, industrial, or residential structure, installation or building (. . . excluding residential buildings having four or fewer dwelling units) . . . . For purposes of this definition, any building, structure or installation that contains a loft used as a

---

[1] McManus will be referred to as "Respondent."

[2] 40 C.F.R. § 22.20(a)

> dwelling is not considered a residential structure, installation or building . . . .[3]

The McManus building is a two story building. The first floor is occupied by three retail stores. The upper floor consists of McManus' private residence. The residence is not connected to the stores on the lower level, and each unit has a separate entrance. (Motion at 4.)

In addressing whether or not the McManus residence is a facility, there are two questions that must be answered. First, is it a "residential building having fewer than four dwelling units?" Respondent urges that the residence is separate from the stores on the first floor of the building, and since there is only one dwelling unit on the second floor, the residence meets the exemption contained in the definition of facility. (Motion at 6.) Complainant argues that the building must be treated as a whole, and therefore is a "mixed-use" building, not a residential building at all. (Response at 3.) Complainant claims that the exception to the exemption which excludes buildings with lofts from the exemption for small residential buildings specifically differentiates mixed-use buildings from residential buildings. (Response at 3.)

Assuming respondent is correct in its assertion that the residence is a residential structure, it also must show that it is not a loft. Respondent offers Webster's Ninth New Collegiate Dictionary's definition of a loft: "ONE OF THE UPPER FLOORS OF A

---

[3] 40 C.F.R. § 61.141.

WAREHOUSE OR BUSINESS BUILDING, especially when not partitioned." (Motion at 7, emphasis in motion.) Respondent's position is that, "the McManus residence, which has separate front and rear entrances . . . and no access to the lower level commercial area, cannot be considered a 'loft' within this or any other common sense definition." (Motion at 7.) Complainant suggests that the key word in the definition of "loft" is "especially." It concludes that, "[this] language . . . in no way excludes partitioned residential space such as [the McManus residence]." (Response at 6.)

Clearly, there is some ambiguity in the meaning of the terms "residential structure" and "loft." However, it was held in United States v. Larionoff, 431 U.S. 864, 872 (1977), that when "construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Based on this standard, without such a showing of error or inconsistency, EPA's interpretation of the ambiguous terms must stand.

Respondent also refers to the preamble to the amendments of the asbestos NESHAP in 1990. (Motion at 7.) The preamble states first, that the "loft" language was added "to clarify that . . . lofts which exceed four dwelling units are subject to NESHAP." (55 Fed. Reg. 48406, 48412 (November 20, 1990).) Second, the preamble states that "[t]he owner of a home that renovates his house . . . is not to be subject to the NESHAP." (Id. at 48412.) (Motion at 7.) However, neither of these comments demonstrate plain error or

inconsistency with the regulation. As complainant argues in its surresponse, and in which the ALJ concurs, these statements apply to "residential only" buildings, not mixed-use dwellings like the McManus building. (Surresponse at 2.)

Therefore, since there has been no showing of plain error or inconsistency with the regulation, complainant's interpretation of the ambiguous terms "residential structure" and "loft" is controlling. The McManus building is a "facility" as defined by 40 C.F.R. Part 61, Subpart M, § 61.141.

It is emphasized that this order does not address the issue of liability or the size of any civil penalty assessed if liability is found. These issues remain to be decided at a hearing, possibly by submissions, or through a negotiated settlement.

IT IS ORDERED that the motion of respondent McManus to dismiss the complaint be **DENIED**.

II

Respondent Heller (hereinafter respondent) served a motion to dismiss on July 14, 1993. Complainant's response was served July 24, 1993. (The complaint alleges that respondent was the contractor who renovated the upper floor of the facility.) Respondent is appearing pro se. The heart of the motion is that respondent is a small contractor who works alone or with a single laborer, and that he was unaware of the regulations addressing asbestos removal. Complainant served a response to the motion on July 22, 1993, which stated that respondent's knowledge, or lack thereof, of NESHAP regulations is not relevant to the issue of

liability. The ALJ concurs in this. There is much authority to support complainant's position. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 383 (1947) (other citations omitted).

IT IS ORDERED that respondent Heller's motion to dismiss the complaint be **DENIED**.

Again, this order does not address the question of liability, or the amount of the civil penalty, if any, to be assessed in this matter. As with respondent McManus, these issues may be resolved by a hearing, possibly by submissions, or negotiations.

III

IT IS FURTHER ORDERED that within **20** days of the service date of this order, the parties shall:

1. Submit their prehearing exchanges.

2. Show cause why this matter is not amenable to resolution by means of an accelerated decision, pursuant to 40 C.F.R. § 22.20.

Frank W. Vanderheyden
Administrative Law Judge

Date: October 26, 1993